UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 435

INLAND STEEL COMPANY,
A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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November 24, 1948.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board (herein referred to as the Board) issued against petitioner.

OPINION BELOW.

The opinion of the Court of Appeals is not yet reported. It is printed at pages 406 to 440 of the record.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 23, 1948 (R. 441). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, Title 28, United States Code, Section 1254, and Section 10(e) of the National Labor Relations Act (hereinafter referred to as the Act), 61 Stat. 146, 29 U. S. Code, Sec. 160(e).

STATUTE INVOLVED.

The statute involved is the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 1947, Act of June 23, 1947, 61 Stat. 136, 29 U. S. Code, Sec. 151, *et seq.* The directly pertinent provisions of the Act as amended are set forth below:

"Sec. 8 (a). It shall be an unfair labor practice for an employer—

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of Sec. 9 (a).

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Sec. 9 (a).

"Sec. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the major-

ity of the employees in a unit appropriate for such purpose, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *."

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner is a Delaware corporation engaged in the manufacture, sale and distribution of steel and steel products through numerous operating divisions and subsidiaries, employing a total of over 19,000 employees (R. 355). Among these are plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, where the present issue arose.

At the time of the hearing before the Board, petitioner and its subsidiaries had recognized 23 different labor organizations as collective bargaining agents for certain of these employees, in 24 different units, each of which had been found by the Board or agreed by the parties to be a unit appropriate for the purposes of collective bargaining. The number of employees included in such units ranged from 8 (at a plant in Kansas City, Missouri) to 10,169 (at the plants in Indiana Harbor, Indiana, and Chicago Heights, Illinois) (R. 221, 332-341).

In 1936 petitioner established a company-wide retirement and pension plan which covered all employees of its operating divisions and subsidiaries earning over $250.00 per month. In 1943 this plan was extended to cover all em-

ployees regardless of the amount of their earnings. In 1945 a pension trust, also company-wide, was added to equalize the retirement benefits available to employees whose principal period of service antedated the establishment of the original and extended plan, and who therefore were precluded from obtaining a normal measure of retirement benefits thereunder (R. 219, 220, 342-344). That plan, like industrial retirement annuity plans throughout the United States (R. 345, 349, 350, 356, 357), provided for retirement at a fixed retirement age (R. 228, 238, 239). During the war emergency such retirement was temporarily suspended, but was resumed in 1945 and 1946, and all employees who had reached retirement age had been retired by April 1946 (R. 345-347). Upon resumption of retirements under the plan the union representing the bargaining unit at petitioner's Indiana Harbor and Chicago Heights plants (herein referred to as the Union) made a demand upon petitioner to bargain collectively thereon. Petitioner refused to enter into discussion on the subject, and advised the Union of its position that it was under no duty to bargain concerning retirement and pension plans (R. 221, 222). The Union thereupon filed charges with the Board (R. 139, 140), and the Board issued its complaint against petitioner herein (R. 141-144), alleging that petitioner by establishing the pension trust referred to above without consulting with the Union and by failing and refusing to negotiate with the Union concerning the retirement of employees under its retirement and pension plan had engaged in unfair labor practices within the meaning of Section 8 (5) of the Act (now Sec. 8 (a) (5) of the Act, as amended).

The evidence before the Board was presented almost entirely by stipulation, and at no time has there been any disputed material issue of fact in the case. The Board on April 12, 1948, issued its decision and order (R. 56-75), holding that petitioner had engaged in unfair labor prac-

tices as charged, and ordering petitioner, *inter alia*, to bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all of its employees in the aforesaid appropriate unit. One member of the Board dissented (R. 76-78).

On petition to review and set aside the order of the Board, the Court of Appeals held that, insofar as it required the petitioner to bargain with respect to retirement and pension matters, the order of the Board was valid, and ordered that it be enforced, basing its decision on the ground that the language of the Act which defines the scope of the statutory duty to bargain so clearly includes a retirement and pension plan as to leave little, if any, room for construction.

QUESTION PRESENTED.

Does the statutory obligation to bargain collectively under the National Labor Relations Act apply to petitioner's retirement and pension plan?

ASSIGNMENTS OF ERROR.

The Court of Appeals erred:

1. In enforcing the order of the Board.

2. In refusing to set aside the order of the Board.

3. In holding that the language employed by Congress in establishing the statutory requirement of collective bargaining, considered in connection with the purpose of the Act, so clearly includes a retirement and pension plan as to leave little if any room for construction.

4. In holding that petitioner's retirement and pension plan is a condition of employment, as that term is used in the Act.

5. In holding that a pension paid under petitioner's

retirement and pension plan is a part of an employee's wages, as that term is used in the Act.

6. In holding that the legislative history of the Act does not support a conclusion contrary to the foregoing.

REASONS FOR GRANTING THE WRIT.

I.

This Petition Presents a Question of Great Public Importance Which Has Not Been But Should Be Authoritatively Determined by This Court.

1.

It is the view both of the Board and of the court below that this is a case of first impression.

Thus the findings and conclusions of the Board's Trial Examiner, adopted by the Board, included the following (R. 88, 89):

> "* * * over the years during which the Act has been administered, the subjects which more commonly are matters of concern between employers and their employees, have been held to fall within or without the scope of collective bargaining. A painstaking examination of the authorities fails to disclose any consideration of the issue here involved."

Similarly, the court below, in discussing the opinions of this Court in *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, and *United States* v. *Mine Workers*, 330 U. S. 258, concluded that:

> "* * * the question here presented was not before the court and we do not regard either of these cases as an expression of the view of the Supreme Court upon the instant question." (R. 419.)

Although it is petitioner's position that the instant case is ruled by *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332,

and *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514 (see *infra,* pp. 12, 16), the precise issue has never before been directly presented, and we respectfully submit that in the public interest it should be now conclusively settled by this Court.

2.

Industrial retirement and pension plans have been in existence for a great many years in this country, many of them antedating the passage of the Act. They represent an investment or commitment on the part of employers totaling several billions of dollars.

As of 1932, pension plans of the *noncontributory* type covered 3,337,000 employees in this country at a normal level of employment (R. 364). Based upon this figure we may conservatively assume the present existence in the United States of noncontributory plans covering at least 3,000,000 employees. The investment cost of the noncontributory pension trust portion of petitioner's pension plan is $1,216.40 per employee covered (R. 327, 328). Applying this cost figure to the estimated 3,000,000 employees covered, the investment in such noncontributory plans would today total $3,655,200,000.

The annual cost to petitioner of the *contributory* portion of its pension plan is a minimum of $159.17 per employee (R. 327, 328). In 1945 the seven largest insurance companies in this country had in force 1,500 contributory plans covering 2,000,000 employees (R. 350). If we assume that all existing plans of this character cover 3,000,000 employees and that the cost per employee is the same as the minimum figure required by the petitioner's plan, the annual contribution by employers to such plans would be $477,510,000.

The magnitude of the sums noted—a charge upon

employers of over three and a half billion dollars on account of noncontributory plans and a cost to employers of nearly half a billion dollars annually on account of contributory plans—indicates the great public importance of the issue here presented.

3.

In structure, these industrial retirement and pension plans are based upon two underlying principles: First, they are company-wide (R. 343, 348, 349) and second, they apply with relative uniformity to all employees (R. 343, 345). Tests of breadth of coverage and uniformity are applied by the Bureau of Internal Revenue in determining whether any such plan will be approved under the provisions of Sections 23(p) and 165(a) of the Internal Revenue Code. U. S. Code, Title 26, Section 23(p), 165(a); cf. R. 328. The requirement of breadth of coverage may likewise determine whether such a plan could exist at all. Thus, the cost of a retirement annuity equal to that provided under the contributory portion of petitioner's plan would be increased by sixty percent where the unit or group of employees covered numbered less than fifty (R. 349).

Under the Act bargaining units are set up without regard to the scope of retirement and pension plans. The applicable statutory provisions as administered by the Board since the Act was passed have in hundreds of cases produced a multiplicity of bargaining units in a single company, particularly in large industrial concerns, as distinguished from single company-wide units. In the case of petitioner, for example, they produced 24 units, 7 by Board certification and 17 by agreement between petitioner and the respective bargaining representatives (R. 332-341). Others of petitioner's employees not as yet

so organized may well be organized in the future in still other and additional collective bargaining units. Many of such units are of small size. Ten of the 24 units among petitioner's employees cover less than 100 persons (R. 334-341). The recent amendments of Section 9(b) of the Act will tend to produce a greater multiplicity of small units in a given company rather than the reverse.

The order of the Board, enforced by the decree of the court below, requires petitioner upon request to bargain collectively with the Union as the exclusive representative of all its employees in the bargaining unit in question with respect to its pension and retirement policies. Petitioner's pension and retirement policies are embodied in its retirement and pension plan. Such policies and the plan which embodies them are, and have been since the plan was instituted in 1936, company-wide in scope. The Board's order would thus require petitioner to bargain with the Union concerning matters lying beyond the unit which it represents—a result clearly unlawful, since the bargain made with that Union would bind the petitioner to impose it on employees in other units having other bargaining representatives.

If it be argued that the Board's order requires the petitioner to bargain concerning retirement and pension policies applicable solely to the employees in the unit represented by the Union, then the effect of the decision will be to destroy the petitioner's company-wide plan, and all existing plans in this country which similarly extend beyond a single bargaining unit. A result so drastic, in view of the other considerations herein presented, would appear to warrant the exercise of this Court's discretion to grant the present petition.

4.

The collective bargaining requirements of the Act apply to labor organizations as well as to employers, and these have, in many cases, resulted in a multiplicity of units represented for bargaining purposes by a single union. At the same time there are presently in existence various retirement and pension plans, established at the instance of particular labor organizations, which are *union-wide* in scope. An essential characteristic of such plans is that they must be uniform in their union-wide application, and not subject to variation from unit to unit as the result of collective bargaining. An example of such a plan is that established at the instance of the United Mine Workers. Cf. *United States* v. *Mine Workers,* 330 U. S. 258. This is a union-wide plan applying uniformly to employees engaged in coal-mining who are members of the United Mine Workers. These employees are organized in numerous separate collective bargaining units. In every case where the Board has considered the question of an appropriate collective bargaining unit for employees represented by this labor organization it has established either a single company unit or a smaller unit. A similar union-wide plan has been established at the instance of the International Brotherhood of Electrical Workers. Cf. U. S. Dept. of Labor, Bureau of Labor Statistics, *Monthly Labor Review,* Sept., 1948, pages 229 *et seq.* This union has been certified by the Board as a collective bargaining representative in over 300 cases in each of which the Board determined that the appropriate unit within which the parties were required to bargain was a single employer unit or a subdivision thereof.

The necessary result of the decision below would be to require each union having a union-wide retirement and pension plan to bargain collectively with respect to such

plan within each separate bargaining unit. It is clear that in such bargaining either the plan would be presented by the union as an ultimatum, without offering any possibility of its being altered for application to the particular unit involved through the process of collective bargaining, or its uniformity would be completely destroyed as the result of such bargaining and the varying bargains reached in the respective units. In the first case, the result would be a refusal to bargain collectively, which would constitute an unfair labor practice under Section 8(b)(3) of the Act; in the second case, the union-wide plan would be destroyed.

Clearly, the interest of both employers and labor organizations in the collective bargaining requirement concerning union-wide plans makes the issue here presented one of great public importance that should be passed upon by this Court.

5.

Since the decision of the National Labor Relations Board in the instant case, other similar cases have been instituted before or have been decided by the Board, many of which will be reviewed in due course by various Courts of Appeals. In the interest of finality and uniformity of decision upon the important issue here presented it is submitted that the Court should grant the prayer of this petition.

II.

The Decision of the Court of Appeals Is in Conflict With the Decision of This Court in J. I. Case Co. v. Labor Board, 321 U. S. 332.

In the brief presented by the National Labor Relations Board to this Court in *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, the Board addressed itself to the proposition that it would be an unfair labor practice for an employer, after representatives had been designated by a majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining. The Board then stated (R. 214, 215):

> "A contemporaneous statement as to what would *not* be considered 'basic subjects of collective bargaining' is found in Twentieth Century Fund, Inc., *Labor and the Government,* New York (1935), pp. 229-230; '* * * an employer * * * may * * * confer with and deal with any individual or group over *matters* not covered by the collective agreement and *not part of wages, hours and basic working conditions—such as insurance, stock-purchase plans and social welfare.*'" (Italics ours.)

It is the view of the Board in the instant case that pensions fall within the general classification of welfare activities (Appendix to Respondent's Brief in Court of Appeals, p. 52, certified as part of the transcript before this Court, R. 403).

With respect to the question thus presented, as to the scope of the duty to bargain under the Act, the opinion of this Court in the *Case case* included the following (*loc. cit.,* p. 339):

> "It also is urged that such individual contracts may embody *matters that are not necessarily included within the statutory scope of collective bargaining,*

> *such as stock purchase, group insurance, hospitalization, or medical attention.* We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice." (Italics ours.)

It is clear from the context that the Court in the passage quoted was addressing itself to the right of an employer to deal with his employees with respect to certain matters on a direct and individual basis, even though there was in existence a majority representative having the exclusive right to bargain collectively for such employees under the Act. And the matters concerning which the employer is free to deal with his employees individually are, as stated by the Board, "matters * * * such as insurance, stock-purchase plans, and social welfare" (which latter includes pensions) and, as stated by this Court, "matters * * * such as stock purchase, group insurance, hospitalization, or medical attention."

The Court of Appeals acknowledged the effect of the quoted language of this Court in the *Case case*, stating in its opinion (R. 419) "* * * it must be conceded that the language furnishes some support for the Company's position, and if this case stood alone as the sole expression of the Supreme Court relative to the question before us it would at least cause us to hesitate."

The Court of Appeals then proceeded, however, to resolve its doubts on this score by reliance upon two conclusions: (1) that the quoted language in the *Case case* was not "an expression of the view of the Supreme Court upon the instant question" and (2) that the effect of that language "is at least offset by the Court's statement in the *United Mine Workers case*" (*United States* v. *Mine Workers*, 330 U. S. 258). These conclusions are erroneous, as will be briefly demonstrated.

(1) The Court in the *Case case* specifically directed its attention to the conditions under which employers had the right to deal individually with their employees. These, the Court found, fall into four categories: (1) situations in which there is no duty to bargain collectively on any subject—as when no representative has been authorized by a majority of employees within an appropriate unit; (2) situations where, despite negotiation in good faith, a collective contract has not been concluded; (3) situations where the collective contract expressly leaves certain areas open to individual bargaining; (4) situations where the matters involved are matters not included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention.

It was plainly the purpose of the Court in the *Case case* to establish an inclusive definition of the circumstances under which the employer is free to contract individually with his employees and therefore is not subject to a charge of failure to bargain within the meaning of the statute. Such a definition was not only appropriate, but was actually required for the proper understanding and implementation of the mandate of the Court, which, in addition, was specifically limited by the Court in that case for the stated reason that "a party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court."

In view of the foregoing the court below was plainly in error in holding that the question here presented was not before this Court in the *Case case*. It clearly was before this Court, it was specifically tendered by the National Labor Relations Board itself as constituting one of several limitations upon the collective bargaining requirements of the Act, and it was so treated by this Court in its opinion in that cause.

(2) The court below was equally in error in holding

(R. 419) that "in * * * *United States* v. *United Mine Workers of America,* 330 U. S. 258, 286, 287, the court made a statement which indicates a view contrary to the Company's present position."

The issue here presented is whether the *compulsory* bargaining requirement of the National Labor Relations Act applies to retirement and pension plans. The statement of this Court in the *Mine Workers case* to which the Court of Appeals refers discloses only that collective bargaining had *voluntarily* gone forward between the Government and the Mine Workers, that the resultant contract included, *inter alia,* provision for a Welfare and Retirement Fund and a Medical and Hospital Fund, and that the provisions of the entire contract and its subsequent modifications "relate to matters which normally constitute the subject matter of collective bargaining between employer and employee." This is emphasized by the following passage from the Court's opinion (*loc. cit.,* p. 287):

> "It is descriptive of the situation to state that the Government, in order to maintain production and to accomplish the purposes of the seizure, has substituted itself for the private employer in dealing with those matters which *formerly were the subject of collective bargaining between the union and the operators.* * * *" (Italics ours.)

The right of employers and unions representing their employees *voluntarily* to enter into agreements concerning retirement and pension plans or policies is not here involved. The sole question presented is whether Congress made such plans or policies a subject of the *statutory compulsory* collective bargaining required by the National Labor Relations Act, and with respect to this issue the language of this Court in the *Mine Workers case* is not in point.

It is respectfully submitted that the Court of Appeals has misunderstood the effect of the decision of this Court

in *J. I. Case Co.* v. *Labor Board, supra,* that its decision is in conflict therewith, and that such conflict should be resolved in view of the great public importance of the issue here presented.

III.

The Decision of the Court of Appeals Is in Conflict With the Decision of This Court in H. J. Heinz Co. v. Labor Board, 311 U. S. 514, 525.

In *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 525, this Court had before it a question as to the scope of the statutory requirement of collective bargaining under the Act. The basis of the Court's decision upon this issue was that Congress *had incorporated in the Act the collective bargaining requirement* of the Railway Labor Act, and of Section 7 (a) of the National Industrial Recovery Act, and the issue there presented was resolved by reference to the "settled practice" "in the bargaining process" "under the earlier acts."

The Court of Appeals, however, has held in the instant case that "a comparison of the language of the two acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act." This holding is clearly in conflict with the decision of this Court in the *Heinz case* that Congress had incorporated "in the new legislation the collective bargaining requirement of the earlier statutes." The existence of this direct conflict upon a question of such general public importance as the scope of the statutory duty to bargain we believe clearly warrants the exercise of this Court's discretion in granting the instant petition.

IV.

The Decision of the Court of Appeals Is in Conflict With Numerous Decisions of This Court Establishing Rules of Statutory Construction Which Are Controlling in This Case.

1.

The Court of Appeals has denied that the language of the Act must be read as it was originally understood by the legislature which used it, and in its contemporary setting, and its decision is therefore in conflict with numerous decisions of this Court, including *County of Schuyler* v. *Thomas,* 98 U. S. 169, *United States* v. *Stewart,* 311 U. S. 60, 64, and *Great Northern Ry. Co.* v. *U. S.,* 315 U. S. 262, 273.

The record is clear as to the "contemporary setting" in 1935 with respect to industrial retirement and pension plans. In that year there were in effect in this country over seven hundred employer-established plans, covering a total of something under 3,500,000 employees (R. 361). At the same time there were in existence an estimated 16,000 collective bargaining contracts, covering a union membership of 4,500,000 employees (R. 365, 366). Yet none of these 16,000 collective bargaining contracts dealt with such retirement and pension plans. Such plans were not regarded as a subject of collective bargaining at the time the Act was passed.

The court below does not deny these facts as to the contemporary setting of the statute, but attempts to avoid their effect by the following argument (R. 418):

> "* * * Such provisions, however, were being generally used at the time of the passage of the Amended Act in 1947. And we doubt the validity of the argument that the language of the latter Act cannot be

> given a broader scope even though Congress used the same phraseology. We do not believe that it was contemplated that the language of Section 9 (a) was to remain static."

There is no support in the record for the statement that "such provisions" (by which the court appears to mean provisions as to retirement and pension plans embraced in collective bargaining contracts) were being "generally used" at the time of the passage of the amended Act in 1947. The evidence is, in fact, directly to the contrary. The record shows such provisions as appearing in only one forty-second of one percent of the 50,000 collective bargaining contracts in effect in the United States in 1945. (Appendix to Respondent's Brief in Court of Appeals, pp. 58, 59, and R. 366.)

As noted above, the court then concludes that it was not "contemplated that the language of Sec. 9 (a) of the Act was to remain static," and in support of its conclusion quotes a passage from the opinion of this Court in *Weems* v. *United States,* 217 U. S. 349, 373, which expresses the undeniable proposition that general language of a statute is not necessarily confined "to the form that the evil had theretofore taken," but should apply equally to *new conditions* which arise with the passage of time.

A brief analysis will disclose that the quoted language from the *Weems case* has no application to the issue here presented. Company-wide industrial retirement and pension plans are not "new conditions" which have arisen since the passage of the Act. Such plans were already in existence in 1935, and had been in existence for many years theretofore (R. 361-364). Congress was aware of that fact, and was aware that they were not considered to be subjects of collective bargaining. Thus, the report of the Senate Committee on Education and Labor on the bill which became the Act stated categorically (R. 368):

"Nor does anything in the bill interfere with the freedom of employers to establish pension benefits" —with exceptions not here material. (Italics ours.)

2.

The Court of Appeals in the instant case has ignored the effect of the requirement of Section 9 (a) and (b) of the Act that collective bargaining in the statutory sense must be confined within units appropriate for the purposes of collective bargaining, which may be the employer unit, craft unit, plant unit, or subdivision thereof. The court in this respect has failed to observe the rule that the whole statute must be examined and all its provisions construed together, *Pollard* v. *Bailey,* 20 Wall. 520, 525, 526, so that inconsistencies may be avoided. *Lamp Chimney Co.* v. *Brass & Copper Co.,* 91 U. S. 656, 663; *United States* v. *Raynor,* 302 U. S. 540, 547; *U. S.* v. *Amer. Trucking Ass'ns.,* 310 U. S. 534, 542. And since in ultimate effect the decision of the court below will either render futile the collective bargaining mandate of the statute or, in the alternative, destroy the existing structure of retirement and pension plans in this country, it is in clear conflict with the settled rule that statutes must be construed so as to avoid an absurd result, or injustice or unnecessary hardship. *United States* v. *Kirby,* 7 Wall. 482, 486, 487; *United States* v. *Katz,* 271 U. S. 354, 357; *Burnet* v. *Guggenheim,* 288 U. S. 280, 285, 286; *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U. S. 315, 332, 333; *U. S.* v. *Amer. Trucking Ass'ns.,* 310 U. S. 534, 543.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued, directed to the said United States Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket as No. 9612,

Inland Steel Company, Petitioner v. *National Labor Relations Board, Respondent,* to the end that this cause may be reviewed and determined by this Court; and that the decree thereof be reversed by this Court and such further relief be granted as to this Court may seem proper.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER.

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STATEMENT.

This brief is in reply to the brief for the National Labor Relations Board in opposition, which was filed on January 7, 1949.

The statement of facts in the Board's brief inadvertently omits one matter of basic importance. Petitioner's original retirement and pension plan of 1936, its extended plan of 1943, and its past service pension trust of 1945 all included compulsory retirement at age 65 (R. 410).

ARGUMENT.

I.

AS A MATTER OF LAW A COMPANY-WIDE RETIREMENT AND PENSION PLAN CANNOT BE BARGAINED ABOUT IN VARIOUS BARGAINING UNITS IN A COMPANY'S PLANTS.

This is the heart of the case. The Board ignores it until the very close of its brief, where it devotes about a page to the question, and even then misunderstands and misstates it. The Board says (Bd. Br. 21):

> "The Company contends (Pet. 8-11, 19) that its present pension and retirement plan cannot, as a practical matter, be bargained about by the Company and the various representatives of the employees in the numerous bargaining units in the Company's plants."

The Company does not so contend. It contends that *as a matter of law* it is impossible for it to bargain collectively with the Union concerning its pension policies. Those policies have at all times been expressed, and are now expressed, in the form of a company-wide retirement and pension plan. Since the duty to bargain is confined to matters concerning which the employer is free to contract with the Union, and since the Act itself prohibits the Company from contracting with the Union concerning matters applicable to other units, *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 44, 45, the Company as a matter of law cannot bargain collectively in the statutory sense concerning its company-wide retirement and pension plan.

It will be argued that this does not prevent bargaining on unit-wide pension and retirement policies. The answer is that, where there are two or more units, such bar-

gaining would tend to destroy a company-wide plan, which is the form that most important plans take (R. 343, 348, 349). It is well known that Congress is interested in furthering the type of security provided by pension and retirement plans. This Court should review a decision which will have an effect so clearly opposed to the Congressional purpose.

It is not a question of the complexity of retirement and pension plans, as the Board and the court below seem to believe (Bd. Br. 21). Were the Company's plan simplicity itself *but company wide,* it would be legally impossible for it to bargain collectively about the plan, for the reason that the duty to bargain is clearly confined (Section 8 (d)) to matters the employer may contract about with the Union and he is prohibited from contracting with the Union about anything outside the unit, as already pointed out.

The Board suggests that the Unions representing the employees in the various bargaining units in the Company's plants might all agree to the same company-wide plan. This amounts to a concession that the bargaining the Board is contending for could be carried out only by obliterating the bargaining units set up under the statute. There could be no more effective demonstration that retirement and pension plans cannot be bargained about in the statutory sense.

II.

AS A MATTER OF LAW A UNION-WIDE PENSION PLAN CANNOT BE BARGAINED ABOUT IN THE VARIOUS BARGAINING UNITS WHICH IT COVERS.

The Board does not see fit to mention this problem, which is fully presented on pages 10 and 11 of our petition. The duty to bargain under the Act applies equally to unions and employers and the definition of the duty is

the same for both. Section 8 (d). There are a number of *union-wide* retirement and pension plans, each of which covers employees of many companies, who are organized in many different bargaining units, and typically no bargaining unit in such cases is larger than company-wide. For the reasons stated under the preceding point, as a matter of law a union-wide pension plan cannot be bargained about in the statutory sense in the various bargaining units which it covers.

The fact is that it is indispensable to the encouragement and growth of retirement and pension plans that this Court shall hold that they are *not* within the ambit of compulsory collective bargaining under the Act. To hold otherwise would restrict and eventually destroy them.

III.

THE J. I. CASE CASE CONCERNED THE PRECISE QUESTION HERE PRESENTED, NAMELY, WHAT SUBJECTS ARE EXCLUDED FROM THE EMPLOYER'S OBLIGATION TO BARGAIN, AND THE HOLDING OF THIS COURT IS CONTRARY TO THAT OF THE COURT BELOW.

The Board does not reach the point of taking issue with the reasons assigned by petitioner for granting the writ until page 19 of a 22-page brief. It then asserts that our contention that the decision of the court below is in conflict with the decision of this Court in *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, is without merit.

Thus the Board asserts that the *J. I. Case case* "concerned the question whether contracts between an employer and individual employees might work a limitation upon the employer's obligation to bargain collectively with the employees' statutory representative on behalf of all of the employees in the unit" (Bd. Br. 19). We agree. But the Board then goes on to say that "The Court did not have

before it, and did not pass upon, the question here presented, whether pension and retirement matters are subjects of compulsory collective bargaining" (id.). With this we flatly disagree.

The Court had before it the question whether matters like retirement and pension plans are subjects of compulsory collective bargaining and held in terms that they are not. The point is fully covered at pages 12 to 14 of our petition, to which we respectfully refer the Court.

IV.

THE DECISION OF THIS COURT IN THE HEINZ CASE IS ALSO CONTRARY TO THAT OF THE COURT BELOW.

The Board attempts to escape from the effect of the decision of this Court in *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, by saying that "There is nothing in the opinion in that case to suggest that the scope of the bargaining requirement under the National Labor Relations Act is limited to precisely the scope of the bargaining requirement under the Railway Labor Act" (Bd. Br. 20). The Board cannot make such a statement except by closing its eyes to the language which this Court used in the *Heinz case* to the effect that Congress incorporated in the Wagner Act "the collective bargaining requirement" of the Railway Labor Act and of Section 7 (a) of the National Industrial Recovery Act. Again the point is fully covered in our petition, page 16, to which we refer.

V.

THE CONTEMPORARY SETTING IN WHICH THE LANGUAGE WAS USED DEMONSTRATES THAT THE ORIGINAL ACT EXCLUDED RETIREMENT AND PENSION PLANS FROM COMPULSORY COLLECTIVE BARGAINING, AND THAT CONSTRUCTION IS CONTROLLING TODAY.

The following statement of the Board (Bd. Br. 20):

> "The court below also properly rejected the Company's contention that when the original Act was passed in 1935, pension and retirement matters were not subjects of collective bargaining and that, therefore, they can not be deemed to fall within the bargaining requirement of the Act (R. 418)"

is both erroneous and misleading. We did so contend, and vigorously. But the court below did not reject the contention; it misunderstood it and rejected an entirely different contention which it imputed to us. Thus, the court said (R. 418):

> "It may be true, as argued by the Company, that retirement and pension plans were employed only to a limited extent in 1935, when the original Act was passed."

It was not true, and it was not argued by the Company, that retirement and pension plans were employed only to a limited extent in 1935 when the original Act was passed. As we have already shown at page 17 of our petition herein, such plans were extensively employed in this country at that time and covered several millions of employees. It is clear from the passage last quoted that the court below entirely missed the point as to the contemporary setting in which the Act was passed.

It is true that the court below agreed with the Board's view that retirement and pension plans were bargained about collectively in 1947 when the Act was amended (Bd. Br. 20), but it is equally true that the extent of such bar-

gaining was relatively insignificant (R. 366, App. to Resp. Br. below 58, 59), and the fact that such bargaining occurred at all is totally irrelevant. The statutory language defining compulsory collective bargaining was not changed in the amendment, and therefore continued to mean in 1947 what it originally meant in 1935. *Heald* v. *District of Columbia*, 254 U. S. 20, 22, 23.

The Board closes its discussion of the scope of compulsory bargaining by referring to what it calls the observation of the court below (Bd. Br. 21) "that Congress did not intend to tie the scope of the bargaining requirement of the Act to 1935 concepts." As a matter of fact, the observation was only a qualified one. What the court actually said was that it "did not believe that it was contemplated that the language of Sec. 9 (a) was to remain static."

The question, however, is not what was "contemplated." Congress has no power to enact a statute and "contemplate" that its language will mean one thing at the time and the opposite at some later date. Whatever it means when it is enacted, it continues to mean. The point is dealt with fully in our petition at pages 17 to 19.

The cases cited by the Board for the purpose of establishing the contrary do not do so. Indeed they support the view that the meaning of statutes does not change. *Board* v. *Hearst Publications*, 322 U. S. 111, cited by the Board on this question, involved the issue whether newsboys are employees of the newspaper companies whose papers they distribute within the meaning of the term as used in the National Labor Relations Act. The court said (p. 124):

> "Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning * * *' Rather 'it takes color from

its surroundings * * * [in] the statute where it appears,' *United States* v. *American Trucking Assns.*, 310 U. S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' "

This is not contrary to our position that the meaning of a statute does not change; it supports it. It holds that the meaning of the term "employees" as used in this Act must be determined from the history, terms and purposes of the legislation. The implication is that, whatever it is determined to mean by those tests, it continues to mean, inasmuch as the history, terms and purposes of the legislation continue to be the same as long as it is on the books.

Weems v. *United States*, 217 U. S. 349, is no more helpful to the Board. All that that case held was that general language in a statute is not confined to the form that the evil had theretofore taken but applies equally to new conditions which arise with the passage of time. We do not deny that proposition; indeed we assert it. The statute continues to mean the same thing and applies to new conditions. Here the conditions (retirement and pension plans) are not new but old. They existed when the language was adopted by the legislature. It excluded them from the ambit of compulsory bargaining. As a result of the passage of time its meaning cannot change so as to include them.

Vermilya-Brown Co. v. *Connell*, 69 S. Ct. 140, is no more helpful to the Board. Indeed, this case also squarely supports our position. The question was whether the Bermuda base leased by the United States during World War II was a "possession" within the meaning of the Fair Labor Standards Act. Of course, when that Act was passed the Bermuda base did not exist and had never been thought of. The Court said (p. 146):

"* * * Under such circumstances, our duty as a Court is to construe the word 'possession' as our judg-

ment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind."

This makes it clear that the meaning of the legislation continues to be precisely what it was when it was passed. That is the rule we urge here. It is a rule long established and universally applied by this Court, and the decision below stands in direct conflict with it.

VI.

THE BOARD'S ARGUMENT THAT THERE IS NO NEED FOR FURTHER REVIEW DEMONSTRATES THE CONTRARY.

The Board concedes that the petition involves a question of importance (Bd. Br. 10) and in the light of the considerations set forth at pages 6 to 11 of our petition this could not be denied. The Board apparently also concedes that the question has not been settled by this Court, as it does not assert the contrary. This is sufficient under paragraph 5 (b) of Rule 38 to justify granting the writ.

The Board attempts, however, to neutralize the effect of these concessions by going directly to the merits and attempting to show that the decision below was correct. But that question does not arise unless review is granted and the very purpose of review is to determine it. To say that, despite the importance of the question and the fact that this Court has not settled it, review should be denied because the decision below is correct constitutes nothing less than an attempt by the Board to usurp the functions of this Court. The Board says, in effect, to this Court, "You need not bother to review this decision. We have done so and find that it is correct." The Board, in effect, has set itself up as the authority to review the Court of Appeals and so save this Court the trouble. We respect-

fully assert that the Board's opinion on the merits is not a valid ground for refusing a review.

We pass now to the Board's attempt to show that the decision below is so clearly correct that there is no need for further review. An elaborate, but only partial, discussion of the merits extends from page 11 to page 19 of the Board's brief and occupies 7 pages of an argument of less than 13. It is difficult to believe that a clear case would require so extensive an argument to support it. The length of the presentation, its complexity and the number of authorities cited and discussed make it clear that the case, on the merits, has two sides. There was a dissent before the Board (R. 76-78) and there are expressions of doubt in the decision below (R. 412, 417, 418, 419). Moreover our petition has disclosed that on four controlling questions the decision of the court below is in error, and, as noted above at pages 2 to 9 of this reply, the Board has failed to refute the existence of such error. For all these reasons we submit that this is not a case in which the Court can anticipate the question which a review would present and say, "There is nothing worthy of review."

If it were proper to do so, we would prepare for the Court's convenience and incorporate in this brief a very succinct reply to the Board's argument on the merits. But rather we heed the warning voiced by Mr. Justice (then Professor) Frankfurter and Professor Hart in The Business of the Supreme Court at October Term, 1933, 48 Harvard Law Review 238, where the following statement appears (p. 265):

> "* * * The major recurrent vice of petitions, apparent from the most casual examination of a representative sampling, is the failure to perceive the elementary distinction between an extended argument on the merits (obviously inappropriate until the merits are before the Court) and an argument on the issue whether *certiorari* should or should not be granted.

> Only in exceptional cases is any but cursory discussion of the merits appropriate in the petition at all."

The fact is that this is preeminently a case where review should be granted. It involves the construction of important language of the National Labor Relations Act, perhaps the most important in that statute. In 18 cases since the Act was passed in 1935 this Court has granted review assigning as the sole reason for such action the fact that the construction of important language of the National Labor Relations Act was involved. We cite them in the margin.*

The question presented by the petition in the instant case is of exactly the same type as in the foregoing cases and of at least equal importance.

Respectfully submitted,

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January 10, 1949.

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* *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 460; *Labor Bd.* v. *Greyhound Lines*, 303 U. S. 261, 264; *Labor Board* v. *Fainblatt*, 306 U. S. 601, 604; *Labor Board* v. *Columbian Co.*, 306 U. S. 292, 296; *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 585; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. 514, 516; *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 430; *Pittsburgh Glass Co.* v. *Board*, 313 U. S. 146, 149; *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 476; *Labor Board* v. *Electric Cleaner Co.*, 315 U. S. 685, 690; *Labor Board* v. *I. & M. Electric Co.*, 318 U. S. 9, 11; *Medo Corp.* v. *Labor Board*, 321 U. S. 678, 680; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 334; *Board* v. *Hearst Publications*, 322 U. S. 111, 113; *Wallace Corp.* v. *Labor Board*, 323 U. S. 248, 251; *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 378; *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385, 387; and *Labor Board* v. *Donnelly Co.*, 330 U. S. 219, 222.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 435

INLAND STEEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 406–440) is not yet reported.[1] The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 56–105) are reported in 77 N. L. R. B. 1.

[1] The opinion of the court below reflects the unanimous opinion of the three judges on the question presented by the instant case (R. 406–419, 434, 440). It also contains the opinion of the court below (R. 434–440) and the dissenting opinion of Judge Major (R. 419–434) on the question presented by *United Steelworkers of America, et al.* v. *National Labor Relations Board*. The latter case is before this Court upon a petition for a writ of certiorari filed by United Steelworkers of America, C. I. O., in No. 431, this Term.

JURISDICTION

The decree of the court below was entered on October 28, 1948 (R. 442–444). The petition for a writ of certiorari was filed on November 26, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that the refusal of an employer to bargain upon request with the exclusive bargaining representative of its employees in an appropriate unit, with respect to pension and retirement matters affecting the employees, constituted a refusal to bargain collectively within the meaning of Section 8 (5) of the Act.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. I, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on April 12, 1948, issued its findings of fact, conclusions of law, and order

(R. 56–105).[2] The pertinent facts, as found by the Board and shown by the evidence, and which are not in dispute (Pet. 4), may be summarized as follows:[3]

Inland Steel Company, hereinafter called the Company, and United Steelworkers of America, C. I. O., hereinafter called the Union, stipulated (R. 83; 218–219) that all production, maintenance, and transportation workers employed by the Company, excluding foremen and other specified classes of employees, constitute an appropriate bargaining unit, and that at all times since May 23, 1942, the Union has been the exclusive bargaining representative of all the employees in such unit.

In January 1936, before the Company's employees had a certified bargaining representative and before any collective bargaining between the Company and the employees had taken place (R. 84; 219–220), the Company established its original retirement plan (R. 84; 219). This plan provided for contributions by participating employees and for payment of retirement annuities pursuant to a contract between the Company and the Equitable Life Assurance Society of the

[2] In its decision (R. 56–73), the Board adopted, with substantial additions and modifications, the findings, conclusions, and recommendations contained in the trial examiner's intermediate report (R. 80–105).

[3] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

United States (R. 84; 219, 229). Participation in the plan was optional and was available only to employees earning at least $250 per month (R. 84; 227).

On August 5, 1942, the Company and the Union entered into their first collective bargaining contract (R. 84; 332–333). The contract made no mention of the retirement plan. It provided for recognition of the Union, and included a maintenance of membership clause and numerous provisions with respect to wages, hours, vacations, and other matters not material here. (R. 84–85; 332–333). In December 1944, or January 1945, the Company, without giving notice to, or bargaining with, the Union in respect thereto, amended its retirement plan so as to make participation in its benefits available to all employees who elected to participate in the plan and who had reached thirty years of age and who had five years of service with the Company (R. 58, 85; 220, 238).[4] The amended plan was supported by joint contributions by the Company and by participating employees (R. 85; 239–240).

On April 30, 1945, the Company and the Union entered into a new contract which by its terms replaced the 1942 agreement (R. 85; 219, 151–189), and continued in effect until October 15, 1946 (R. 85; 180). This contract was amended on February 16, 1946 and extended to February 15,

[4] The terms of the amendments were made effective retroactively as of December 1943 (R. 58; 248–249).

1947 (R. 85; 187–188, 219, 333). In addition to restating, with some variations, the provisions of the 1942 contract, the 1945 agreement contained a number of new provisions. Among the latter were those dealing with "in-plant feeding" of employees (R. 85; 177) and dismissal or severance pay for employees who might be displaced as a result of the Company's closing certain wartime facilities in order to reduce production costs (R. 85; 177–179).

The severance pay section of the contract did not provide for specific payments. It was included in the contract merely as a statement of principle in which the Company and the Union agreed to accept a portion of a directive of the National War Labor Board, dated November 25, 1944, which approved the principle of severance pay and directed the parties "to negotiate the terms of a severance pay agreement appropriate to each plant * * *" (R. 85; 179). The directive, as quoted in the 1945 contract, further stated as follows (R. 85; 178):

> Among the provisions which should be worked out through collective bargaining are those relating to the eligibility of employees, the amount of severance pay benefits, and circumstances under which the benefits should be paid, the transfer of employees to other suitable employment, *the relation to existing pension and retirement plans, etc.* [Italics supplied.]

Although the contract provided that the "Company and the Union agree to negotiate with regard to this directive" (R. 179), the parties, in negotiating the 1945 contract, engaged in no bargaining about matters relating to retirement or pension plans, and neither the Company nor the Union has requested collective bargaining pursuant to the contract clause providing for such bargaining, quoted immediately above (R. 85–86; 223).

On December 28, 1945, the Company, again without first consulting or notifying the Union, established its Past Service Pension Trust (R. 86; 220–221). The Pension Trust provided benefits for employees for service rendered the Company prior to the effective date of the Company's Retirement Plan (R. 86; 308–309). Its purpose, according to the Company, was to make special provision for older employees whose retirement date would occur so soon after they became eligible to participate in the Retirement Plan that they would not otherwise receive the retirement annuity benefits intended (R. 86; 333–334). The Pension Trust was financed by the Company without employee contributions (R. 86; 314) and provided that, absent exceptional circumstances, every employee must be retired at the age of sixty-five (R. 86; 309).

Between December 28, 1945, and February 22, 1946, the Company announced its intention to retire approximately 256 employees as of March

31, 1946, because they had reached the age of sixty-five (R. 86; 221). On February 22, 1946, the Union filed a grievance with the Company in which it protested the Company's contemplated action and declared that the automatic retirement of employees at the age of sixty-five would be a breach of the seniority-and-discharge-notice provisions of the Company's contract with the Union (R. 87; 221). On March 5, 1946, at a meeting between representatives of the two parties, the Company notified the Union that it would not negotiate or deal with the Union concerning the grievance, on the ground that the Union had no right to question the Company's policies with respect to the retirement of employees (R. 87; 221–222).

Thereafter, the Union's membership authorized its executive board to take strike action if the Company persisted in enforcing its retirement policies (R. 87; 202–203). The Union's executive board, however, decided against calling a strike (R. 87; 204).

On March 25, 1946, the Company and the Union held another meeting in which the Company again refused to discuss the Union's grievance concerning the Company's retirement policies (R. 87–88; 221–222). The Company concluded the meeting with the statement that it would not discuss retirement matters further with the Union on the ground that the legal issues involved in the question of an employer's obligation under the Act

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to bargain collectively on the subject of retirement of employees would have to be presented to the National Labor Relations Board (R. 87–88; 222).

On April 1, 1946, and on various dates thereafter, the Company, without consulting the Union, retired 224 employees in accordance with the provisions of the Retirement Plan and the Pension Trust (R. 88; 222).

The Board found that the Company, by its conduct described above, had refused to bargain with the Union concerning the substance and application of its pension and retirement program, and that the Company is continuing to do so "because of its fixed view that the establishment and operation of such a program is a management function outside the scope of the collective bargaining rights granted employees under the Act" (R. 72, 101).

The Board ruled that pension and retirement matters are part of the subject matter of collective bargaining as contemplated and required by the Act because they fall within the terms "wages" and "other conditions of employment" as used in Section 9 (a) and because the legislative history of the Act shows a Congressional intent that such subjects be encompassed within the collective bargaining obligation (R. 58, 59, 63, 65). The Board, therefore, held that an employer, both under the original Act and the Act

as amended, is under "a statutory duty to bargain collectively with the accredited representative" of his employees in an appropriate unit "concerning the terms of a pension and retirement program" (R. 67–70). Accordingly, the Board concluded (R. 70, 72) that the Company, by refusing to bargain with the Union concerning the Company's pension and retirement program, had violated Section 8 (5) and (1) of the Act.

The Board ordered the Company to cease refusing to bargain collectively with the Union regarding the Company's pension and retirement policies, and to cease making changes in them which would affect the employees involved, without first consulting with the Union, and directed the Company, upon request, to bargain with the Union with respect to its pension and retirement policies (R. 73–74).[5] The order also requires the Company to post appropriate notices of compliance (R. 74).[6] Board Member Gray dissented (R. 76–78).

[5] The Board conditioned these portions of its order upon the Union's compliance, within thirty days from the date of the order, with the filing and reporting requirements of Section 9 (f), (g), and (h) of the Act as amended (R. 73–74). The question of the propriety of this condition is not presented in the instant case. That question is presented by the Union's petition for a writ of certiorari in No. 431.

[6] The order provided that the notices were to be posted forthwith for a period of thirty days. If, within that time, the Union complied with Section 9 (f), (g), and (h) of the amended Act, the notices were to remain posted for an additional thirty days (R. 74).

The Company filed a petition for review of the Board's order in the court below (R. 1–45). On September 23, 1948, the court handed down its unanimous opinion on this question (R. 406–440), and, on October 28, 1948, entered its decree (R. 442–444) enforcing the Board's order.[7]

ARGUMENT

While the ruling of the court below, that the National Labor Relations Act imposes upon an employer the obligation to bargain collectively with respect to pension and retirement matters affecting his employees, involves a question of importance, the decision so clearly follows the terms of the Act, read in the light of its purpose, and is so clearly in accord with principles enunciated by this and other courts, that there is no need for further review. Contrary to the

[7] As noted above (*supra*, p. 9, fn. 5), the Board conditioned the effectiveness of its bargaining order upon the Union's compliance, within thirty days from the date of the order, with the filing and reporting requirements contained in Section 9 of the Act as amended. The court's decree modified the Board's order in this respect. The decree provides that the bargaining order shall be effective "if and when" * * * [the Union] shall have complied within thirty (30) days from the date of this Decree (or, in the event that the Union shall file a petition for a writ of certiorari in the Supreme Court of the United States within the time limited by law, then within thirty (30) days after the denial of such petition, or, if said petition be granted, within thirty (30) days after the issuance of the mandate of the Supreme Court of the United States in the proceedings upon said writ of certiorari) with Section 9 (h) of the Act as amended * * *" (R. 442–443).

Company's contention (Pet. 12–19), there are no conflicting decisions.

1. Section 8 (5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)," and the latter section provides that the duly selected representative of the employees in an appropriate unit shall be their exclusive representative "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *." These phrases compose the statute's principal delineation of the scope of the collective bargaining requirement.

The Board held that pension and retirement matters are encompassed by the terms "wages" and "other conditions of employment" as used in Section 9 (a) of the Act (R. 59–70). The court below agreed, stating (R. 412):

> we are convinced that the language employed by Congress, considered in connection with the purpose of the Act, so clearly includes a retirement and pension plan as to leave little, if any, room for construction.

The contributions which an employer makes to a pension plan form part of the compensation or remuneration received by the employee for his labor. Both the weekly wage and the pension benefits are received by the employee in return for his labor and not for any other reason. The future pension benefits are a product of the work-

er's current labor and thus enhance the total return upon his labor. If he were employed at a corresponding job at the same cash wage at another plant which had no pension plan, he would be receiving less for his labor than he now receives. Therefore, the Board could correctly conclude, as it did (R. 60), that such pension contributions by an employer are "emoluments of value * * * which may accrue to employees out of their employment relationship * * *" that the contribution "in whole or in part * * * provides a desirable form of insurance annuity which employees could otherwise obtain only by creating a reserve out of their current money wages or purchasing similar protection in the open market. In substance, therefore, the * * * [Company's] monetary contribution to the pension plan constitutes an economic enhancement of the employees' money wages, their actual total current compensation is reflected by both types of items."

This and other courts have noted that it is essential to the collective bargaining process that the employer deal with the Union with respect to all matters affecting the compensation of employees. The manner in which, the times at which, and the persons to whom any increase in remuneration goes are the most important aspects of bargaining. If some groups receive increased compensation, it may be at the expense of other groups or "at the cost of breaking down some

other standard thought to be for the welfare of the group." *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 338. It is, therefore, "generally conceded to include the right of the representative of the unit to be consulted and to bargain about *the exceptional* as well as the routine rates, rules and working conditions" (italics supplied). *Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U. S. 342, 346–347. This Court has said, further, that a "Welfare and Retirement Fund and a Medical and Hospital Fund" are matters which "normally constitute the subject matter of collective bargaining between employer and employee." *United States* v. *United Mine Workers of America,* 330 U. S. 258, 286–287. From a realistic point of view alone, therefore, the Board was warranted in concluding that pension contributions by an employer are part of the whole wage structure of his plant and reasonably fall within the statutory term "wages" as a subject of compulsory collective bargaining.

The reasonableness of a construction of the term "wages" as used in the Act to include pension and retirement matters is demonstrated further by the broad interpretation given the term by courts which have construed it in other settings. The court below observed, for instance (R. 416–417), that,

> the Board has been sustained in a number of cases where it has treated for the pur-

> pose of remedying the effects of discriminatory discharges, in violation of Section 8 (3) of the Act, pension and other "beneficial insurance rights of employees as part of the employees' real wages and, in accordance with its authority under Section 10 (c), to order reinstatement of employees with * * * back pay," and has required the employer to restore such benefits to employees discriminated against. See *Butler Bros., et al.* v. *N. L. R. B.*, 134 F. 2d 981, 985, *General Motors Corp.* v. *N. L. R. B.*, 150 F. 2d 201, and *N. L. R. B.* v. *Stackpole Carbon Co.*, 128 F. 2d 188. In the latter case, the court stated (page 191), that the Board's conclusion "seems to us to be in line with the purposes of the Act for the insurance rights in substance were part of the employee's wages."

Similarly, the court below observed (R. 417), that

> In the Social Security Act (49 Stat. 642, Sec. 907, 42 U. S. C. A. Sec. 1107), the same Congress which enacted the National Labor Relations Act defined taxable "wages" as embracing "all remuneration * * * for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash * * *". This definition has been construed, as the Supreme Court noted, in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 365 (note 17), as including "vacation allowances," "sick pay," and "dismissal pay."

And, to the same effect (*ibid.*),

> In the field of taxation, pension and retirement allowances have been deemed to be income of the recipients within the Internal Revenue Act definition of wages as "compensation for personal services." (26 U. S. C. A. Int. Rev. Code Sec. 22 (a)) * * * *Hooker* v. *Hoey,* 27 F. Supp. 489, 490, affirmed 107 F. 2d 1016 * * *

The above considerations, we submit, demonstrate that the Board has placed a wholly reasonable construction upon the statutory term "wages" in concluding that, for the purposes of the collective bargaining requirement of the Act, the term includes an employer's contributions to a pension plan for the benefit of his employees.

In addition, such a plan clearly falls within the compulsory bargaining requirement as a "condition of employment." While a man works in a plant which has a pension plan he is building an interest in the pension fund upon which he will draw when he retires. It would deny the plain meaning and "natural construction" of words (*Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 186) to say that such a pension arrangement is not a "condition" of the man's employment.

Similarly, no plainer example of a "condition of employment" could be found than the compulsory retirement feature of a pension plan, which the Company asserted in the court below is in-

extricably a part of any pension plan (R. 410). The condition under which the employee works is that he will be required to cease work at a specified age. Compensation aside, no more vital condition could attach to a man's employment than the condition that it be terminated at a certain date. The contention that the Act does not require an employer to bargain about termination of employment because of age cannot be squared with the accepted fact that it does require him to bargain about termination in the form of nondiscriminatory discharges or lay-offs for other causes. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 360; *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. 2d 632, 635 (C. A. 4).

The pertinent legislative history fully supports the Board's position. In the course of amending the Act in 1947, Congress rejected proposed changes in terms which would specifically have excluded pension and retirement matters from the bargaining requirement,[8] and retained the language of the original Act of 1935, which it was clearly given

[8] It was pointed out to the Senate by Senator Wagner and others that the proposed substitution of the term "working conditions" for the term "conditions of employment" in Section 9 (a) "would narrow the scope of collective bargaining to exclude many subjects such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism." 93 Cong. Rec. 3323. See also, Hearings before the Senate Com-

to understand included such matters within the requirement.[8]

Moreover, while Section 302 of Title III of the amending Act proscribes the payment by employers of money or any other thing of value to employee representatives, Section 302 (c) (5) excepts from this proscription, under certain conditions, payments to trust funds established for employees' "medical or hospital care, [or] pension on retirement or death * * *." One of the conditions upon which the exception depends is that the fund be jointly administered by employer and employee representatives together with such neutral persons as may be agreed upon by the parties. We submit that it is highly unlikely that Congress would have given employees' bargaining representatives the right to participate with employers in the joint administration of such employee welfare plans and at the same time, without saying so, intended to withhold

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mittee on Labor and Public Welfare, on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., p. 1914. Similarly, a bill proposed in the House contained a specific definition of the subject matter of collective bargaining which would have omitted pensions and related matters from the bargaining requirement. Sec. 2 (11), H. R. 3020, 80th Cong., 1st sess.

[8] Senator Wagner's statement referred to above (p. 16, fn. 8) clearly suggests that pensions and insurance matters were understood to be included in the term "conditions of employment." In the House, Representative Madden said, to the same effect, that "Bargaining on this type of welfare-fund system is completely within the area of appropriate collective bargaining under the present provisions of the act." 93 Cong. Rec. 3634.

from the employees the right to bargain collectively through such representatives about the establishment and administration of such plans.

There is nothing in the legislative history of the original Act of 1935 which impairs the validity of the Board's view. The only portion of that history relied upon by the Company before the court below was that relating to the general effect of Section (8) (2) of the Act which made it an unfair labor practice for an employer to dominate, support, or interfere with, the formation or administration of a labor organization. The report of the Senate Committee on Education and Labor on the bill which became the Act (S. Rep. No. 573, on S. 1958, 74th Cong., 1st Sess., p. 10) stated: "Nor does anything in the bill interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like, so long as such organizations do not extend their functions to the field of collective bargaining, and so long as they are not used as a covert means of discriminating against or in favor of membership in any labor organization." Read in context, however, and in the light of comments by Senator Wagner on the floor of the Senate[10] and at Committee hearings,[11] it is clear that this statement did not relate to the scope of the bar-

[10] 78 Cong. Rec. 3443–3444, 79 Cong. Rec. 2371–2372, 7570.

[11] Hearings before the House Committee on Labor on H. R. 6288, 74th Cong., 1st sess., p. 15. Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st sess., p. 41.

gaining requirement of Section 9 (a) of the Act, but was made solely to avoid having Section 8 (2) misconstrued so as to prohibit contributions to employee welfare funds.

2. The Company's contention (Pet. 12–16) that the decision of the court below is in conflict with the decisions of this Court in *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, and *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, is without merit. Neither of these cases involved the question here presented.

The *J. I. Case* case concerned the question whether contracts between an employer and individual employees might work a limitation upon the employer's obligation to bargain collectively with the employees' statutory representative on behalf of all the employees in the unit. 321 U. S. at 333–334. The Court did not have before it, and did not pass upon, the question here presented, whether pension and retirement matters are subjects of compulsory collective bargaining. Indeed, the Court pointedly avoided expressing an opinion upon the question whether an employer's refusal to bargain about subjects "such as stock purchase, group insurance, hospitalization, or medical attention," would constitute a violation of the Act. (*id.* at p. 339.) Moreover, we submit that the court below correctly observed (R. 419) that, "the support which the Company professes to find in the *Case* case is at least offset by the court's statement in the *United Mine*

Workers case," namely, that matters such as a "Welfare and Retirement Fund and a Medical and Hospital Fund" are matters which "normally constitute the subject matter of collective bargaining between employer and employee." *United States* v. *United Mine Workers of America,* 330 U. S. 258, 286–287.

The Company's reference to the *Heinz* case (Pet. 16) does not better its position. There is nothing in the opinion in that case to suggest that the scope of the bargaining requirement under the National Labor Relations Act is limited to precisely the scope of the bargaining requirement under the Railway Labor Act.

The court below also properly rejected the Company's contention that when the original Act was passed in 1935, pension and retirement matters were not subjects of collective bargaining and that, therefore, they can not be deemed to fall within the bargaining requirement of the Act (R. 418). The court agreed with the Board's view that such matters were, in fact, bargained about prior to 1935.[12] The court also agreed (R. 418) with the Board's view (R. 67) that such matters were, in fact, bargained about collectively at the time the Act was amended in 1947.[13]

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[12] The economic data cited in the Board's decision so demonstrates (R. 64, n. 19).

[13] Both the economic material cited in the Board's decision (R. 67, n. 25) and that set forth in the record demonstrate this fact (Bd. App. 58–61). See also the statement of this

In any event, the court below correctly observed (R. 418) that Congress did not intend to tie the scope of the bargaining requirement of the Act to 1935 concepts. There is no rule of construction which requires such a narrow interpretation of the statute. Indeed the decisions of this Court are directly to the contrary. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 124; *Weems* v. *United States,* 217 U. S. 349, 373; *Vermilya-Brown Company Inc.* v. *Cornell,* No. 22, this Term, decided December 6, 1948. The cases relied upon by the Company (Pet. 17) are not to the contrary.

3. The Company contends (Pet. 8–11, 19) that its present pension and retirement plan cannot, as a practical matter, be bargained about by the Company and the various representatives of the employees in the numerous bargaining units in the Company's plants.[14] But the question presented by this case is whether pension and retirement matters, generally, are subjects of compulsory collective bargaining under the Act. As the court below observed (R. 409), "the bargaining requirements of the Act include all retirement and pension plans or none" and the Company's retirement and pension plan, complicated as it is

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Court in the *United Mine Workers* case, *supra*, 330 U. S., at pp. 286–287.

[14] Cf. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 384–385.

asserted to be, must be treated and considered the same as any other such plan" (R. 409–410).

In addition, the practical difficulties envisaged by the Company (Pet. 8–9) could arise only if the views of its employees' various representatives were so far apart and tenaciously pressed as to create an impasse. There is no reason to anticipate such a situation and it should be borne in mind, too, that the obligation to bargain does not necessarily impose an obligation to agree. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decisions nor any novel questions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strike and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing

power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SECTION 8. It shall be an unfair labor practice for an employer—

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

2. The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, Sec. 101 (61 Stat. 136, 29 U. S. C. Supp. I, 141, *et seq.*) are as follows:

SECTION 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

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